

>> COURT IS STILL IN SESSION SO WE ARE GOING TO MOVE TO THE NEXT CASE.

AS YOUR EXITING I ASK YOU TO PLEASE - ALL RIGHT.

THE NEXT CASE ON THE DOCKET IS THE STATE OF FLORIDA VERSUS JOHNSON.

>> MISTER CHIEF JUSTICE.

>> MAYBE WAIT A MINUTE WHILE THEY EXIT.

PLEASE.

IF YOU ARE LEAVING, PLEASE LEAVE.

WE NEED QUIET IN THE COURTROOM TO PROCEED WITH THE NEXT CASE.

GIVE THEM A SECOND HERE.

ALL RIGHT.

I THINK YOU CAN PROCEED.

>> MISTER CHIEF JUSTICE, MAY IT PLEASE THE COURT, KIMBERLY ACUNA FOR THE STATE AND I RESERVED 5 MINUTES WORK WITH.

THIS IS ABOUT THE MELBOURNE ANALYSIS, PRESERVING A CLAIM OF ERROR AFTER A NEW FULL REASON HAS BEEN PROVIDED.

IN THIS CASE WHEN THE STATE USED A PEREMPTORY STRIKE ON A PROSPECT OF JUROR, A MELBOURNE OBJECTION WAS MADE, A NEUTRAL REASON WAS REQUESTED AND A RACE NEUTRAL REASON WAS GIVEN AND FOUND AND THE TRIAL COURT UPHELD THE STRIKE.

AT NO POINT DID THE DEFENSE COUNSEL QUESTION THE STATE'S REASON IN ANY MANNER.

AT NO POINT DID DEFENSE COUNSEL REQUEST A MORE SPECIFIC FINDING OR ADVISE THE JUDGE OF ANY NONCOMPLIANCE WITH MELBOURNE.

BEFORE THE JURY WAS SWORN THE DEFENSE COUNSEL INDICATED HE COULD NOT ACCEPT THE JURY BECAUSE OF HIS PREVIOUS MELBOURNE OBJECTION.

AFTER THE DEFENDANT WAS FOUND GUILTY AND APPEALED ON APPEAL FOR THE FIRST TIME HE ALLEGED

THE TRIAL COURT DID NOT COMPLY WITH MELBOURNE BECAUSE IT DID NOT HAVE A GENUINE ASSESSMENT. IN A 2-1 DECISION THE FOURTH REVERSED AND REMANDED FOR NEW TRIAL FINDING THE TRIAL COURT DID NOT COMPLY WITH STEP 3 OF MELBOURNE, THE MAJORITY CONCLUDED THE CLAIM WAS PRESERVED IN THE RECORD DID NOT INDICATE IMPLICIT FINDING OF GENUINENESS.

JUDGE KOONTZ DISSENTED AND WOULD HAVE FOUND THE CLAIM WAS NOT PRESERVED.

THE FOURTH DID CERTIFY CONFLICT WITH THREE OTHER CASES, BROWN OUT OF THE FIFTH, IVY OUT OF THE SECOND AND HANNAH OUT OF THE THIRD BECAUSE THEY ADHERE TO THE ANALYSIS IN SPITZER ONE THAT PRESERVING A CLAIM OF ERROR AFTER NEUTRAL REASON HAS BEEN PROVIDED YOU MUST MAKE AN EXPLICIT CLAIM OF PRETEXT.

THE STATE ASKS THE COURT TO RESERVE THE CONFLICT, QUASHED THE DECISION OF THE FLOOR AND HOLD ONCE A NEUTRAL REASON HAS BEEN PROVIDED AN OPPONENT OF A PEREMPTORY STRIKE MUST CHALLENGE THAT AS A PRETEXT FOR IMPERMISSIBLE DISCRIMINATION TO PRESERVE A CLAIM THAT THE TRIAL COURT HAS NOT COMPLIED WITH THE MELBOURNE PROCEDURE.

I WOULD START WITH REFERRING TO MELBOURNE ITSELF.

THE TWO KEY PRINCIPLES IN MELBOURNE THAT PAHRUMP 3 STRIKES ARE PRESUMED TO BE EXERCISED IN A NONDISCRIMINATORY MANNER.

THE BURDEN OF PERSUASION THROUGH THE PROCESS TO ESTABLISH THAT BURDEN OF PERSUASION INCLUDES MAKING AN EXPRESSED CLAIM AND, THEREFORE, IF AN EXPRESSED CLAIM OF PRETEXT HAS NOT BEEN MADE THEN THE CLAIM IS NOT PRESERVED AND WHAT I'D LIKE

TO DO IS WALK YOU THROUGH WHAT HAPPENED HERE, OKAY, A MELBOURNE OBJECTION WAS MADE SO THE PROCESS WAS BEGUN, FROM BEGINNING TO END OF THE PROCESS, THE PROCESSOR HAD THE BURDEN OF PROJECTION, TRIAL JUDGE, YES, I HAVE MUTUAL REASON, PREFERS CSI EVIDENCE.

I FIND THAT TO BE A RACE NEUTRAL REASON.

STRIKE IS UPHELD, THE OBJECTOR WANTS TO COURT TO COME DOWN HERE AND REVIEW THIS -- WHAT HAPPENED HERE AT THE END, AT END OF THE PROCESS THAT SHE DIDN'T DO IT RIGHT BUT WHEN THE REASON WAS GIVEN IT WAS PRESUMED TO BE GENUINE AND NONDISCRIMINATORY AND THAT'S A HURDLE THAT COMES UP, HE HAS THE BURDEN THE WHOLE WAY, HE LOOKS AT THE HURDLE AND LOOKS AWAY AND NOTHING AND HE WANTS YOU TO REVIEW WHAT HAPPENED, BUT IF HIS BURDEN INCLUDES MAKING AN EXPRESSED CLAIM A PRETEXT A PLURALITY AND SPENCER 2 SAYS YOU HAVE TO MAKE EXPRESSED CLAIM TO MAKE YOUR BURDEN, YOU'RE RELIEVING HIM OF THE BURDEN HERE AND YOU CAN'T DO THAT BECAUSE THE OBJECTOR HAS IT THE WHOLE TIME, THEY HAVE TO OVERCOME THAT HURDLE, PRESUMPTION.

SO TO REVIEW A CLAIM --

>> LET ME ASK YOU, THE UNITED STATES SUPREME COURT HAS LEFT IT UP TO THE STATES TO COME UP WITH PROCEDURES THAT IMPLEMENT THE PROTECTIONS AFFORD BY BATSON, CORRECT?

>> YES.

>> JOHNSON CASE IS VERY INTERESTING TO ME, IN THAT CASE THE U.S. SUPREME COURT WAS LOOKING AT CALIFORNIA PROCEDURES WHICH ARE VERY SIMILAR TO THE WAY THE FEDERAL COURTS HANDLE IT.

>> STEP 1 IS HIGHER.
>> STEP 1 IS THE POINT AT WHICH THE PERSON WHO'S OBJECTIVE HAS TO MAKE PRIMA FACIA, STEP 1?
>> YES.
>> THAT'S HOW THE BURDEN IS INITIALLY MET, SEEMS LIKE IN FLORIDA WE ELIMINATED STEP 1 COMPLETELY, ALL THE OPPONENT HAS TO DO IS TO POINT OUT THAT THIS IS A PERSON OF A PRESENTED CLASS, CORRECT?
>> YES, YOUR HONOR.
>> THE FLORIDA PROCEDURE GIVES NO BURDEN OF PERSUASION WITH RESPECT TO DISCRIMINATION OF STEP 1, CORRECT?
I MEAN, YEAH, BECAUSE IF THEY SAY THIS IS A PROTECTED CLASS, THEN RACE NEUTRAL REASON HAS TO BE GIVEN BY THE PROPONENT OF THE STRIKE?
>> YES.
>> OKAY, SO ESSENTIALLY WE ARE TALKING ABOUT WHETHER THERE IS GOING TO BE A BURDEN OF PERSUASION AT ALL BECAUSE IF WE DON'T REQUIRE IT AT STEP 3, THEN WE -- WE ELIMINATE THE BURDEN OF PERSUASION ALTOGETHER AND THAT'S ESSENTIALLY YOUR ARGUMENT, RIGHT?
>> CORRECT, JUDGE, THAT ONCE THE REASON IS GIVEN, IT TRIGGERS HIM HAVING TO REBUT IT, HAVING TO REBUT IT AND DOESN'T GET RELIEVED OF THAT AT ANY POINT AFTER THAT.
>> OKAY.
>> OKAY.
SO IN HERE THE RECORD CONCLUSIVELY SHOWS THAT A CLAIM OF PRETEXT WAS NEVER MADE. SO UNDER THE REASONING OF THE FOURTH UCA'S OPINION THE OBJECTOR'S FAILURE TO RESPONSE TO THE REASON AT ALL, MAIL YOUR TO MAKE HIS RECORD HAS BEEN TRANSFORMED INTO ERROR BY THE TRIAL COURT AND BASED ON

MELBOURNE ITSELF, YOU CAN'T DO THAT, THE PRESUMPTION AND THE BURDEN, YOU HAVE TO HOLD HIM TO HIS BURDEN AT THAT POINT.

STATE IS ALSO RELYING ON BASIC APPELLATE LAW THAT YOU HAVE TO MAKE AN ARGUMENT BELOW BEFORE YOU CAN RAISE IT ON APPEAL AND THE PURPOSE OF THAT IS NOTICE, YOU TO PUT THE JUDGE ON NOTICE OF WHAT THE CLAIM IS SO THE JUDGE CAN ADDRESS IT AT THE TIME THAT IT CAN BE ADDRESSED.

SO STATE WOULD REFER THE COURT TO ITS OPINIONS IN FLOYD, KING AND HOSKINS CITED IN THE BRIEFS AND BASED ON THE REASONING OF THESE CASES AS WELL, OBJECTOR'S CLAIM WAS NOT PRESERVED.

2, COMPONENTS OF THAT REASONING ARE NOTICE TO THE TRIAL COURT AND ADDRESSING WHETHER THE TRIAL COURT HAS ANY RESPONSIBILITY TO DEVELOP THE RECORD.

SO IN FLOYD, AS I'M SURE THE JUSTICES RECALL, THE STATE EXERCISED THE STRIKE, RAISED MUTUAL OBJECTION WAS MADE AND STATE GIVE MUTUAL REASON, I THINK HE SAID 2 YEARS WAS THE MAXIMUM AND IT WAS A DEATH PENALTY CASE AND TRIAL JUDGE SAYS, I DON'T KNOW WHAT HE SAID, BUT THE RECORD WILL SHOW WHAT THEY SAID AND THEN DEFENSE SAID NOTHING, SO THEN ON APPEAL LIKE IN THIS CASE FOR THE FIRST TIME THEY SAY, OH, THAT REASON WAS WRONG, THAT'S NOT SUPPORTED BY THE RECORD, THAT JUROR SHOULD HAVE NEVER SAID THAT BUT THE TRIAL COURT WAS NEVER PUT ON NOTICE THAT IT WAS DISPUTED AND THIS COURT SAID YOU HAD TO PUT THE COURT ON NOTICE, YOU DON'T PUT THE COURT ON NOTICE, THERE'S A DISPUTE, THEN YOU HAVEN'T PRESERVED IT.

SO IT'S THE SAME REASONING HERE.
>> AND ESSENTIALLY THOSE ARE THE

SAME THINGS, THERE ARE TWO THINGS THAT HAPPENED. IF WE SHIFT THE PRIMA FACIA SHOWING TO THE PARTY THAT HAS THE BURDEN OF PERSUASION TO STEP 3, IF THEY DO DO NOTHING, THEY HAVEN'T PUT THE COURT ON NOTICE, SO THAT'S THE PRESERVATION PROBLEM BUT THEY ALSO HAVEN'T MADE ANY SHOWING, THEY HAVEN'T MADE A PRIMA FACIA SHOWING OF DISCRIMINATION, CORRECT?

>> CORRECT, JUDGE.

>> IF I UNDERSTAND YOU CORRECTLY, YEAH.

THE DEFENSE IN THIS -- IN THIS CASE DEFENSE COUNSEL.

>> THAT MADE THE OBJECTION.

>> MADE THE OBJECTION, RAISES THE FACT THAT THE PERSON, PROSECUTOR IS CHALLENGING IS AN AFRICAN AMERICAN.

>> YES.

>> AT THAT POINT IN TIME I'VE DONE THIS A THOUSAND TIMES, THEN YOU TURN TO THE PROSECUTOR AND TELL THEM, OKAY, I MAKE A FINDING THAT IT IS A MEMBER OF A IDENTIFIABLE CLASS, AFRICAN AMERICAN, WHAT REASON DO YOU HAVE, HE SAYS THE JURY -- THE PROSECUTOR HERE TOLD US OR TOLD THE COURT, WELL, HE'S -- HE PREFERS, HE WILL GIVE MORE GRIEVANCE TO CSI AND KNOW THAT THAT'S A MAJOR PROBLEM BECAUSE PEOPLE ARE WATCHING ALL OF THE SHOWS AND THEY THINK THAT -- THEY THINK THAT THE POLICE CAN GET, CSI PEOPLE CAN DO ANYTHING THAT THE TV SAYS THEY CAN.

[LAUGHTER]

>> SO I'VE BEEN THERE, DONE THAT, SO THE PROSECUTOR IS WHAT JUDGE SAYS HE'S GOING GET MORE GRIEVANCE TO CSI, AT THAT POINT WHAT YOU'RE SAYING IS IF THE DEFENDANT, DEFENSE COUNSEL, DOESN'T EXPLAIN MORE, LIKE, OKAY, JUDGE, WHAT OTHER REASON,

HE'S DOING NOT FOR THE THAT,
HE'S DOING IT FOR ANOTHER
REASON, UNLESS THERE'S THAT,
THEN IT HASN'T BEEN PRESERVED.

>> YEAH, IT HAS TO HAVE BEEN
CHALLENGED AS PRETEXT FOR
DISCRIMINATION.

>> HE HAS TO SHOW THE JUDGE THAT
THE CSI REASON IS NOT THE REAL
REASON.

>> MULTITUDE OF WAYS THAT IT CAN
BE DONE, YOU KNOW, JUDGE, THE
OTHER JURORS, THEY WERE
QUESTIONED ABOUT CSI EVIDENCE,
YOU KNOW, AND THEY ARE NOT
AFRICAN AMERICAN, THAT WAS STILL
EARLIER ON IN THE STRIKING
PROCESS, BUT THE STATE HAD
EXERCISED THE STRIKE.

>> BUT THE PROSECUTOR COULD HAVE
DONE THAT, I MEAN, IN THIS CASE,
OF COURSE, THE JUDGE CUT THE
PROSECUTOR OFF IN THE MIDDLE OF
HIS EXPLANATION, THAT'S NOT
HELPFUL, BUT HERE THE PROSECUTOR
COULD HAVE SAID, YOU KNOW,
JUDGE, THE REASON I'M ACCUSING
THIS, THIS PERSON BECAUSE HE'S
GOING TO MAKE ME PROOF ALL THE
CSI STUFF AND I'VE ASKED THE
SAME QUESTION OF EVERY SINGLE
JUROR BECAUSE THAT'S IMPORTANT
IN TODAY'S CLIMATE GIVEN THE TV
SHOWS AND SO ON AND ON.

A PROSECUTOR COULD HAVE DONE
THAT AND -- AND THAT WOULD HAVE
BEEN THE EXPLANATION.

IT WOULD HAVE BEEN THE END OF
IT.

>> SHE COULD HAVE AND I -- YOU
KNOW, WHETHER SHE WAS CUT OFF OR
NOT IT'S A RECORD, WE DON'T KNOW
IF SHE TRAILED OFF AND THE JUDGE
JUST WENT ON WITH THE PROCESS,
CONTINUING FROM THE COLD RECORD,
WE DON'T KNOW, BUT WE DO KNOW
CONCLUSIVELY THAT THE JUDGE SAID
NOTHING.

>> AS FAR AS IT'S GENUINE OR
NOT, WE HAVE PEOPLE ON THE

BENCH, JUDGE WHO IS ARE SUPPOSED TO BE EXPERIENCE ENOUGH TO KIND OF SENSE WHEN SOMEBODY IS NOT BEING GENUINE, BEING DISINGENUOUS, SHOULD THAT BE AFFORDED -- ISN'T THAT WHY WE HAVE JUDGES FOR, LISTEN TO THE PROSECUTOR AND HAVE THE PROSECUTOR FOR THE FIRST TIME, I MEAN, JUST SPEAKING HYPOTHETICALLY SAY, CSI, THAT'S THE REASON I'M DOING IT HERE, JUDGE, CAN'T THE JUDGES SAY, WELL THAT'S JUST BULL, I DON'T KNOW WHY YOU'RE DOING THIS, NO, BUT JUDGE --

>> WELL, IT'S NOT ON THE JUDGE TO MAKE THE RECORD AND I THINK THAT'S THE POINT OF FLOYD AND THE OTHER CASES HOSKINS AND KING, IT'S NOT ON THE JUDGE TO CARRY THE BURDEN FOR THE OBJECTOR TO TAKE HIM BY THE HAND AND SAY I WILL WALK YOU THROUGH YOUR OBJECTION IN HOSKINS THAT WAS THE DESPERATE QUESTIONING CASE FOR THE FIRST TIME IN APPEAL THEY MADE THAT ARGUMENT AND THEY SAID NO, YOU DIDN'T BRING TO JUDGE BELOW, SIMILAR SITUATED JUROR.

>> RESPOND TO THE ARGUMENT THAT THE MELBOURNE-TYPE OF QUESTION ARE SIMILAR IN NATURE TO LIKE RICHES AND INQUIRY OR PERHAPS SOMEBODY RAISING THE FACT THAT THE DEFENDANT IS NOT COMPETENT AND, YOU KNOW, AT THAT POINT IN TIME, THAT'S OUT THERE.

AND YOU CAN'T REALLY CONTINUE UNTIL THAT'S RESOLVED AND --

>> I KNOW THE MAJORITY HERE MADE THAT COMPARISON.

I'D FIRST, YOU KNOW, POINT OUT JUST ON THEIR FACE PEREMPTORY STRIKES, DISCOVERY VIOLATIONS, COMPETENCY, YOU KNOW, THEY ARE VERY DIFFERENT THINGS BY NATURE, VERY DIFFERENT.

AND --

>> LET ME ASK YOU ONE OTHER QUESTION.

>> OKAY.

>> DO YOU THINK IT WOULD BE BETTER TO FIX WHAT I VIEW AS A PROBLEM WITH HAYES BY PLACING THE BURDEN IN STEP ONE LIKE THEY DO IN FEDERAL COURTS?

IN OTHER WORDS, YOU CAN'T JUST THROW OUT THERE THAT THIS PERSON IS IN A PROTECTED CLASS BECAUSE -- GENDER IS A PROTECTED CLASS, EVERYBODY IS IN A PROTECTED CLASS AND THEN IF YOU HAD TO MAKE SOME SHOWING IN STEP 1 IT WOULD INFORM THE JUDGE AT THE VERY BEGINNING OF THE DECISION THAT HAS TO BE MADE, YOU KNOW, THAT YOU WOULD HAVE TO SAY THIS LOOKS DISCRIMINATORY BECAUSE, YOU KNOW, THEY -- THIS IS THE PATTERN, WHATEVER THE MINIMAL LEVEL WOULD BE NECESSARY UNDER JOHNSON, WOULD THAT BE A BETTER APPROACH THAN THE WAY WE'VE DONE IT IN FLORIDA WHICH IS ESSENTIALLY SHIFT THE BURDEN OF PERSUASION OR THE BURDEN OF COMING TOWARD PRIMA FACIA EXPLANATION TO STEP 3?

>> WOULD THAT BE BETTER APPROACH? YEAH, WE DON'T REALLY BRIEF THAT ISSUE.

>> I KNOW.

>> MAYBE YOU CAN ADDRESS THAT IN REBUTTAL.

>> OKAY.

>> IT ALLOWS THE OTHER SIDE TO HEAR WHAT THE REASON IS BEFORE ACCUSING SOMEONE OF HAVING ENGAGED IN DISCRIMINATION?

>> THAT'S A VERY GOOD POINT JUSTICE MURPHY AND HERE AGAIN IT WAS A VERY GOOD REASON AND IT'S VERY POSSIBLE THAT MAYBE HE DIDN'T RECALL THAT, BUT, YEAH, THAT MR. GARVIN HAD PREFERENCE FOR CSI EVIDENCE AND HE ACKNOWLEDGED, OKAY, AND WALKED AWAY ONCE HE HEARD IT.

BUT TO QUICKLY, I KNOW I'M IN MY REBUTTAL TIME, AS FAR AS COMPETENCY HEARINGS, AS BEING COMPARING WHAT'S HERE, COMPETENCY IS SUCH A FUNDAMENTAL NATURE, RIGHT, A PERSON IF THEY CAN'T CONSULT WITH THEIR ATTORNEY, THEY CAN'T UNDERSTAND THE CHARGES, GOES TO FUNDAMENTAL FAIRNESS --

>> ISN'T THAT WHAT JURY --

>> JURY SELECTION, IT CAN BE WAIVED, IT'S NOT AT THE SAME LEVEL AND THE OTHER THING I WANT POINTED OUT, NO OTHER COURT, RICHARDSON HAS BEEN AROUND FOREVER, NO OTHER COURT HAS EVER MADE THIS KIND OF COMPARISONS BECAUSE I DON'T THINK THEY ARE COMPARABLE AND -- AND I WILL RESERVE THE REMAINDER OF MY TIME FOR REBUTTAL.

>> MR. CHIEF JUSTICE, MAY IT PLEASE THE COURT, RICHARD G. BARTMON ON BEHALF OF GEOVANI JOHNSON, THIS CASE IS REALLY ABOUT NONCOMPLIANCE WITH MANDATORY OBLIGATION BY A TRIAL JUDGE TO CONDUCT THE STEP 3 INQUIRY, IT'S NOT ABOUT PRESERVATION, IT'S CLEAR FROM BOTH THE FEDERAL COURT AND THE FLORIDA COURTS THAT TRIAL JUDGE HAS OBLIGATION ONCE CLAIM IS MADE OF DISCRIMINATORY STRIKE TO CONDUCT MANDATORY BUT INQUIRY --

>> WHERE HERE WAS THE CLAIM OF DISCRIMINATORY STRIKE MADE, WHERE WAS THE PRIMA FACIA?

>> STEP 1 PUTS THE COURT ON NOTICE THAT THEY HAVE TO CONDUCT THE --

>> NOT UNDER FLORIDA LAW, STEP 1 IS JUST ALERTING THE COURT TO THE FACT THAT THIS PERSON IS A MEMBER OF A CLASS.

ANY PROTECTED CLASS, CORRECT?

>> WHICH PLACES THE COURT ON NOTICE, IT'S AN INTEGRATED PROCESS, IT DOESN'T STOP AT STEP

1, THERE'S A 3-STEP INTEGRATED PROCESS, THE COURTS HAVE BEEN ON NOTICE FOR 24 YEARS WHAT THE PROCESS IS.

>> UNDER HAYES AT WHAT POINT DOES THE OPPONENT OF THE STRIKE MAKE A PRIMA FACIA SHOWING OF DISCRIMINATION?

>> WELL, WHAT FLORIDA REQUIRES JUST AS YOU DESCRIBED IN TERMS OF GETTING THE PROCESS STARTED, IT IS A REDUCED STANDARD AND THE REASON FOR THAT WE DON'T WANT TO OBSCURE THE IMPORTANCE OF STEP 3 WITH PROCEDURAL HURDLES THAT ARE UNNECESSARY AND THAT'S SOME OF SOME OF THE RATIONAL THAT RUNS THROUGH THE CASES.

>> BUT THE OTHER PRIMARY THING UNDER BATSON, MELBOURNE, FLORIDA, THERE'S NO COURT THAT DISAGREES THAT THE THAT THE PEREMPTORY STRIKES ARE TO BE USED IN NONDISCRIMINATORY MANNER, CORRECT?

>> CORRECT.

NO COURT THAT DISAGREES, FEDERAL THAT BURDEN OF PERSUASION AS TO DISCRIMINATION REMAINS WITH THE OPPONENT OF THE STRIKE THROUGHOUT THE PROCESS, CORRECT?

>> CORRECT.

>> YOU'RE SUGGESTING THAT THERE'S A REVERSAL WHERE THE PROPONENT -- OPPONENT OF THE STRIKE HAS NOTHING.

>> SHOULD BE REVERSED WHEN THE TRIAL JUDGE DOESN'T CONDUCT MANDATORY OBLIGATION, CONDUCT WHAT IS THE CRITICAL STEP OF EVALUATING WHETHER DISCRIMINATION HAS BEEN DONE --

>> WHETHER OR NOT THERE'S BEEN ANY PRIMA FACIA SHOWING OF DISCRIMINATION --

>> WELL THE PROCESS IN FLORIDA, WHERE WAS THE OPPORTUNITY FOR THE OPPONENT TO MEET BURDEN OF PERSUASION.

THERE WAS NO STEP 3, NONE.

>> THE REASON WAS BECAUSE
DEFENSE COUNSEL DIDN'T REBUT
WHAT THE RACE NEUTRAL REASON
WAS.

>> I WOULD RESPECTFULLY
DISAGREE, YOUR HONOR, THE REASON
THERE WAS NO REASON THE JUDGE
STOPPED AND DIDN'T GO FURTHER
AND RULED ON THE STRIKE.
WHAT OTHER -- THERE HAS TO BE AN
OPPORTUNITY.

>> WHAT PREVENTED COUNSEL FROM
SAYING, NO, THAT'S PRETEXTUAL?

>> AFTER THE RULING HAS BEEN
DONE WE WILL IMPOSE WAIVER ON A
SITUATION WHERE HE NOW IS ONTO
NEXT PANEL IN TERMS OF STRIKES
AND NOW HE HAS TO THINK ABOUT
NEXT PANEL BUT GO BACK AND THINK
ABOUT OBJECTING WHAT THE COURT
HAS ALREADY RULED ON, I THINK
THAT'S SORT OF IMPOSES SOME SORT
OF BURDEN THAT WOULD BE
GROSSLY UNFAIR IN THE SITUATION.
THERE'S NO REAL OPPORTUNITY AND
ALL COURTS IN FLORIDA HAVE SAID
THERE HAS TO BE AN OPPORTUNITY
FOR AN OPPONENT TO MEET THE
BURDEN OF PERSUASION.
IF THE TRIAL COURT FORECLOSES
THAT, WHERE --

>> ISN'T IT ALSO A FOUNDATION
PRINCIPLE, THOUGH, THAT WHEN A
TRIAL COURT HAS MADE AN ERROR
THAT COUNSEL HAS OBLIGATION TO
PRESERVE IT, BRING IT TO THE
COURT'S ATTENTION, WHERE IN THE
RECORD DID COUNSEL HEARSAY, YOUR
HONOR, YOU'RE UNDER AN
OBLIGATION TO DO STEP 3, YOU
DIDN'T DO IT, LET ME TELL YOU
WHY THIS IS PRETEXT?

>> INITIAL OBJECTION WHICH
IMPOSES UPON THE TRIAL JUDGE
MANDATORY OBLIGATION TO CONDUCT
THAT STEP 3 AND WITH HIS
REOBJECTION WHERE HE CITES THE
MELBOURNE AND SAYS I STILL HAVE
A PROBLEM WITH THIS JUROR AND
HOW THE STRIKE WAS -- WAS MADE.

AND THAT IS HOW THE COURT GETS NOTICE AND THE COURT AT THAT POINT NOTICE TO CONDUCT ALL ASPECTS OF MELBOURNE, THE MOST CRITICAL STEP OF WHICH IS STEP 3 WITHOUT THAT WE DON'T HAVE MEANINGFUL PROCEDURE.

>> JUST TO BE CLEAR -- BECAUSE THE WHOLE FUNCTION THAT WE ARE LOOKING AT HERE IS MAKING THE RECORD THAT WE CAN LOOK AT, WHAT IS WRONG WITH LET'S SAY WE FOLLOWED A NORMAL PROCESS HERE, JUDGE I HEREBY OBJECT TO CHALLENGE BECAUSE THE PERSON HE'S CHALLENGING IS AFRICAN AMERICAN, HISPANIC, WHATEVER, ONCE THAT'S DONE, THE JUDGE TURNS TO THE PROSECUTOR IN THIS PARTICULAR CASE AND SAY, OKAY, COURT FIND THAT IT IS A MEMBER OF A CLASS AND I WANT YOU GIVE ME, YOU KNOW, AN EXPLANATION AND THE PERSON SAYS, WELL, JUDGE, HE'S CSI THING, WHAT WRONG AT THIS POINT IN TIME ONCE THE PROSECUTOR OFFERS THE EXPLANATION FOR THE CHALLENGE, THE CSI EXPLANATION, WHAT IS WRONG IN THIS JUNCTURE WITH REQUIRING DEFENSE COUNSEL TO EXPLAIN TO THE COURT WHY THAT'S NOT GOOD ENOUGH?

>> WELL --

>> THAT WOULD ANSWER ALL THE QUESTIONS.

>> WELL, YOUR HONOR, IT SEEMS TO ME THAT'S WHAT THE STEP 3 PROCESS IS FOR AND WE DIDN'T HAVE A STEP 3 PROCESS.

>> BUT IT DOESN'T -- IT REQUIRES THE COURT TO DO THAT, NOT -- WHY NOT REQUIRE THE DEFENSE COUNSEL TO EXPLAIN IT, JUDGE, THAT'S NOT GOOD ENOUGH AND THEN GET INTO SOME KIND OF DIALOGUE AS TO WHY IT ISN'T GOOD ENOUGH.

>> BECAUSE AS JUSTICE KAVANAUGH SAID IN FLOWERS, IT'S THE TRIAL COURT BECAUSE OF HISTORY OF

DISCRIMINATION, BECAUSE OF THE VARIETY OF CONSTITUTIONAL INTEREST THAT ARE AT STAKE THAT -- INTEGRITY OF THE PROCESS OF COURT ITSELF.

>> IF THAT WERE ALTOGETHER TRUE WE WOULD HAVE INDEPENDENT OBLIGATION ON TRIAL JUDGES TO OBJECT TO PEREMPTORY STRIKES, WE LEAVE IT ON THE OPPOSING PARTY TO RAISE THIS ISSUE.

>> BUT THE ESSENCE OF THE INQUIRY, JUDGE, IS THIS GENUINE INQUIRY IN STEP 3, THAT'S WHAT MAKES IT MEANINGFUL, THAT'S HOW WE PROMOTE AND PROTECT CONSTITUTIONAL RIGHTS INVOLVED AND THAT'S HOW WE FIGHT THE EVIL RACIAL DISCRIMINATION WHICH ATTACKS THE INTEGRITY OF THE COURTS ITSELF --

>> PROCEDURE, THE PROCESS INITIATED BY AN OBSERVATION THAT THE PERSON IS A MEMBER OF PROTECTED CLASS AND THEN THE PROPONENT OF THE STRIKE IS ASKED TO GIVE A GENDER NEUTRAL REASON, WHATEVER.

>> CORRECT.

>> AND AT THAT POINT THE REASON IS GIVEN IF IT IS NEUTRAL THEN IT IS PRESUMED TO BE NONDISCRIMINATORY, CORRECT? ALL WE HAVE NOW IS A PARTY WITH A BURDEN OF PERSUASION THAT IT'S DISCRIMINATORY, THE FEDERAL COURTS LEAVE THAT BURDEN ON THE OPPONENT OF THE STRIKE, IT NEVER LEAVES THE OPPONENT OF THE STRIKE.

WE HAVE NEUTRAL REASON THAT'S GIVEN THAT'S PRESUMED TO BE NONDISCRIMINATORY.

IF THE TRIAL JUDGE -- IF THE OPPONENT DOESN'T RAISE ANYTHING TO INDICATE THAT IT IS DISCRIMINATORY AT THAT POINT AND THE JUDGE DOESN'T SEE ANYTHING, THAT SHOULD END IT, CORRECT?

>> JUDGE, I THINK WE ARE

CONFUSING BURDEN OF PRESERVATION
WITH BURDEN OF PROOF AND THAT
OCCURS IN STEP 3, BURDEN OF 3,
THERE'S NO STEP 3, SHE STOPPED
THE PROCESS, RACIALLY BASE
NEUTRAL.

THE TRIAL COURT FULFILLS
OBLIGATION TO CONDUCT STEP 3,
SHE STOPPED, NEVER DID THAT,
IT'S CLEAR ON THE RECORD THERE
WAS NEVER INQUIRY --

>> WHAT DOES FLOYD SAY ABOUT
THAT?

DOESN'T FLOYD SAY SPECIFICALLY
AT THAT POINT THE PROPONENT OF
THE STRIKE HAS TO COME FORWARD
AND QUESTION?

>> BURDEN OF PERSUASION IS STEP
3.

>> WE ARE TALKING ABOUT STEP 3
IN FLOYD WHEN THAT'S WHEN THE
OPPONENT OF THE STRIKE HAS TO
COME UP WITH A REASON AS TO WHY
THAT'S NOT A VALID REASON --

>> IF THERE HAD BEEN A STEP 3
INQUIRY, THERE WASN'T IN THIS
CASE, YOUR HONOR, THERE WAS NO
STEP 3, SHE RULED ON THE STRIKE
WITHOUT EVER REACHING THE
ESSENTIAL CRITICAL STEP OF
MELBOURNE AND WITHOUT THAT STEP
WE HAVE NO MEANINGFUL PROCEDURE
TO PROMOTE THE INCREDIBLE BY
SIGNIFICANT CONSTITUTIONAL
INTEREST THAT GO BEYOND
LITIGANT, PARTY, ATTACHED TO
PERSON THAT INVOLVED COMMUNITY
AT LARGE, THE COMMUNITY COULD
HAVE CONFIDENCE AND FAIRNESS AND
INTEGRITY OF THE PROCESS.

I'M SORRY, YOUR HONOR, GO AHEAD.

>> IT DOESN'T SEEM RIGHT TO
REQUIRE THE TRIAL JUDGE TO
COMPLETE THE OBJECTION ON BEHALF
OF THE DEFENSE, JUSTICE VARGAS
EXAMPLE, WE HAVE SITUATIONS
ROUTINELY WHERE EVIDENCE IS
OFFERED FOR ADMISSION, THE JUDGE
SAYS, DENIED, WILL NOT ALLOW IT
IN AND THEN THERE'S EVIDENCE FOR

THE RECORD TO BE CONSIDERED ON APPEAL.

SO THE OBJECTION IS PRESERVED AND YOU MOVE FORWARD AND DOES SEEM INCUMBENT ON DEFENSE LAWYER TO DO MORE ON WHAT WAS DONE.

>> IF, IN FACT, THERE WAS A STEP 3, IF YOU ELIMINATE STEP 3, IF THAT NO LONGER TAKES PLACE, TRIAL COURT'S OBLIGATION TO CONDUCT INQUIRY BECOMES OPTIONAL, IN OTHER WORDS, IT'S NOT MANDATORY IN EVERY CASE, YOU EVISCERATE THE PROCEDURE, YOU COMPLETELY EVISCERATE THE PROCEDURE, WHERE WOULD THE TRIAL COURT THEN -- THERE'S NO TRIAL FINDING, THERE'S NO TRIAL ASSESSMENT.

>> WELL, THE THING IS --

>> NO TRIAL COURT DETERMINATION ON WHETHER THE STRIKE WAS GENUINE.

>> THE TRIAL JUDGE'S FUNCTION COMES AT THE END AS TO WHETHER THE EXPLANATION GIVEN IS GENUINE OR NOT, BUT BEFORE WE GET THERE AS I MENTIONED BEFORE, PROSECUTOR SAYS, I'M EXCUSING THE JUROR BECAUSE CSI THING, AT THAT JUNCTURE AS I SUGGESTED BEFORE WHY NOT TURN TO THE DEFENSE COUNSEL AND THE JUDGE HAS SAID, WELL, YOU FIND EXPLANATION ACCEPTABLE AND DEFENSE COUNSEL SAYS NO, JUDGE, BECAUSE OF THIS, ONCE DEFENSE COUNSEL PROVIDES INFORMATION AND PERHAPS PROSECUTOR REBUTS THEN THE JUDGE STEPS IN AND MAKES FINAL DECISION AS TO WHETHER I DON'T BELIEVE PROSECUTOR OR WHATEVER.

>> YOUR HONOR, THE OPPONENT'S BURDEN OF PRECURSOR TO STEP 3 IT SEEMS TO ME RATHER THAN AS A COMPONENT OF STEP 3 AND IT IGNORES THE FACT THAT THE TRIAL JUDGE INITIALLY IS THE PARTY RESPONSIBLE FOR ENFORCING THE

PROTECTION AGAINST
DISCRIMINATION IN PEREMPTORY
CHALLENGES, IT'S THE TRIAL
JUDGE'S OBLIGATION THAT THEY
NOTIFY BY INITIAL OBJECTION AND
THAT'S PART OF THE PROCEDURE AND
ESSENTIAL CRITICAL STEP BY WHICH
THE TRIAL COURT EVALUATES THAT.
IF YOU IMPOSE AN ADDITIONAL
PROCEDURAL HURDLE BEFORE YOU GET
TO STEP 3 AND IN CASES WHERE WE
DIDN'T HAVE A STEP 3, THAT --
THAT ESSENTIALLY MEANS STEP 3 IS
NO LONGER MANDATORY AND STEP 3
IS NO LONGER MANDATORY, WE DON'T
HAVE A PROCEDURE, WE DON'T HAVE
A PROCESS AND WE ARE BACK TO
SQUARE 1, WE ARE BEFORE
MELBOURNE AS MILLER CASE IN
SUPREME COURT, IF STEP 2
PROCESS, IF THE END OF STEP 2
PROCESS IS SUFFICIENT ANSWER TO
THE QUESTION, WE ARE BASICALLY
BACK TO THE DAYS OF SWING WHERE
WE DON'T HAVE A PROCEDURE THAT
THE JUDGE IS OBLIGATED TO
ENFORCE.

IT'S REQUIRED TO CONDUCT THAT
EVALUATION, THAT'S THE CRITICAL
STEP HERE.

>> ISN'T IT INHERENT IN THE
JUDGE'S RULING THAT HE FOUND THE
EXPLANATION TO BE GENUINE?

>> THERE'S ABSOLUTELY NO
LANGUAGE ABOUT GENUINE HERE,
AGAIN THERE, HAS TO BE SOME FORM
OF INQUIRY, EVALUATING THE
CIRCUMSTANCES, APPLYING THE
FACTORS.

>> HE RULED ON BEHALF OF THE
STATE, ISN'T IT INHERENT --

>> NEUTRALITY, SHE WAS VERY
CLEAR WITH JUST RELATED TO
NEUTRALITY, THERE WAS NEVER ANY
LANGUAGE OR REFERENCE TO ANY
ASPECT --

>> SO THE JUDGE HAS TO SAY THE
WORDS, GENUINE?

>> WELL, WHAT THE JUDGE HAS TO
DO -- RECORD HAS TO REFLECT THAT

THE JUDGE DID THAT KIND OF EVALUATION IN SOME WAY.

>> SEEMS INHERENT IN THE RULING.

>> IT CAN'T BE INHERENT IN THE RULING IF THAT PROCESS DIDN'T TAKE PLACE AND THE ONLY RULING WAS I FIND IT TO BE RACE NEUTRAL, PERIOD, AND SO SHE WAS UNDER THE IMPRESSION THAT THAT I ONLY HAVE TO DO THE FIRST TWO STEPS, THERE'S NO STEP 3, SHE DIDN'T DO STEP 3.

>> TO COMPLY AT THE END, THE JUDGE WOULD HAVE TO SAY, I FIND THAT THE EXPLANATION GIVEN BY THE PROSECUTOR OR THE DEFENSE COUNSEL TO BE RACE NEUTRAL AND THAT ACCOMPLISHES THE GENUINE STUFF?

>> WELL, THE JUDGE HAS TO CONDUCT THE INQUIRY THAT DIDN'T TAKE PLACE HERE, THAT'S --

>> LET ME ASK IT THIS WAY, SO IF -- IF YOU AGREE THAT UNDER BATSON, THE U.S. SUPREME COURTS LEFT IT UP TO STATE TO PROTECT THE RIGHTS THAT ARE AT ISSUE.

>> YES.

>> OKAY.

AND YOU UNDERSTAND THAT AT A FEDERAL LEVEL AND SOME STATES THERE'S A BURDEN OF COMING FORWARD WITH THE PRIMA FACIA CASE OF DISCRIMINATION IS PLACED AT STEP 1 ON THE OPPONENT OF THE STRIKE, CORRECT?

>> I DON'T NECESSARILY AGREE, YOUR HONOR.

THE TRIAL COURT IS RESPONSIBLE AND MANDATORY OBLIGATION TO CONDUCT INQUIRY INCLUDING STEP 3.

FEDERAL COURTS AS WELL AS FLORIDA COURTS.

>> ASSUMING I'M CORRECT IN JOHNSON IN FEDERAL LAW AND IN CALIFORNIA, BURDEN OF COMING WITH SOME PRIMA FACIA SHOWING MINIMAL OF DISCRIMINATION IS ON THE OPPONENT OF THE STRIKE, IF

WE PUT THAT AT STEP 3, WOULD THAT BE A PROBLEM UNDER THE UNITED STATES CONSTITUTION, WOULD IT BE UNCONSTITUTIONAL?

>> WING WE HAVE IT AT STEP 3, JUDGE.

>> YOU'RE SAYING WE DON'T, YOU'RE SAYING THAT WE DON'T, THAT THE OPPONENT OF THE STRIKE DOESN'T HAVE TO SAY ANYTHING AT STEP 3.

>> NO, NO, STEP 3 HAS TO BE HELD WHERE THE OPPONENT HAS TO BE HELD OF BURDEN OF PERSUASION AND OPPORTUNITY TO MEET THAT, BUT DOESN'T OCCUR PRIOR TO STEP 3, STEP 3 IS WHERE THAT TAKES PLACE, STEP 3 IS WHERE IT BECOMES GERMANE, GENUINENESS DOESN'T HAVE SOME RELEVANCE UNDER MELBOURNE IN FEDERAL CASE UNTIL STEP 3 IS DONE AND THE ESSENCE OF WHAT THE COURTS HAVE SAID BOTH FEDERAL IN FLORIDA IS THAT THE TRIAL COURTS IS RESPONSIBLE FOR ENFORCING ALL OF THE CONSTITUTIONAL RIGHTS WHICH ARE SIGNIFICANT AND KEEPING RACIAL DISCRIMINATION --

>> IF THE OPPONENT SAYS NOTHING AFTER THE FACIALLY MUTUALLY REASON IS GIVEN, WHY HAVEN'T THEY ACCEPTED IT AS GENUINE JUST LIKE IT APPEARS THAT THEY DID HERE AND APPEARS THE TRIAL COURT DID?

I MEAN, THEY HAVE AN OBLIGATION -- THEY HAVE THE BURDEN OF PERSUASION, IT'S NOT THE JUDGE'S BURDEN OF PERSUASION, IF THEY ACCEPT IT AND SAY NOTHING ELSE, WHY ISN'T THAT AN ACCEPTANCE OF THE GENUINENESS?

>> WELL, THE TRIAL COURT WOULD STILL HAVE THE OBLIGATION TO MAIN -- TO FIND WHETHER, IN FACT, IT WAS GENUINE, IN OTHER WORDS, WE CAN'T -- IT'S NOT NEUTRALITY IS NOT SYNONYMOUS WITH GENUINENESS.

>> YOU WANT THEM TO SAY THE WORDS?

>> I WANT THE PROCEDURE TO BE CONDUCTED.

>> IT SEEMED LIKE IT WAS CONDUCTED.

IT SEEMS LIKE IT WAS CONDUCTED.

>> HOW CAN IT BE CONDUCTED WHEN, YOUR HONOR, WITH ALL RESPECT WHAT WAS CONDUCTED HERE WAS STEP 1 AND STEP 2, PERIOD, THERE WAS NEUTRALITY, THAT'S AS FAR AS THE TRIAL JUDGE WENT BUT GENUINENESS IS WHERE ALL OF THIS BECOMES RELEVANT AND THAT NEVER HAPPENED.

>> IT SEEMS LIKE THE LOGIC OF YOUR ARGUMENT IS THAT YOU'RE FUNDAMENTALLY CHALLENGING THE PREMISE THAT THE BURDEN OF PERSUASION IS ON THE OBJECTOR BECAUSE ACCORDING TO THE LOGIC OF YOUR ARGUMENT IT SEEMS TO ME THAT ONCE STEP 1 HAPPENS, YOU CAN HAVE THE SITUATION WHERE IN THIS CASE THE PROSECUTION GIVES A FACIALLY RACE NEUTRAL REASON, THE COURT COULD TURN TO DEFENSE COUNSEL AND SAY, WHAT'S YOUR RESPONSE, THE DEFENSE COUNSEL COULD SAY I HAVE NO RESPONSE AND ACCORDING TO LOGIC OF YOUR ARGUMENT UNLESS THE COURT THEN ITSELF INDEPENDENTLY TESTED THE GENUINENESS THAT WOULD BE ERROR.

>> THAT IS THE PROCEDURE WE HAVE, YOUR HONOR.

>> WHICH MEANS THERE'S NO BURDEN OF PERSUASION ON THE OBJECTOR.

>> IT MEANS THAT THERE OUGHT TO BE -- TRIAL JUDGE COMPONENT WHICH DID NOT TAKE PLACE, THERE'S NO SUCH INQUIRY, AS A COMPONENT OF THE INQUIRY, THE COMPONENT HAS MATTER PERSUASION. YOU'RE CREATING A SITUATION WHERE THE FAILURE TO OBJECT BECOMES A BURDEN OF PRESERVATION, YOU NEVER GET TO STEP 3, STEP 3 CEASES TO BE

MANDATORY AND STEP 3 CEASES TO HAVE ANY MEANING, THERE'S NO GENUINENESS INQUIRY THAT HAS TO BE CONDUCTED IF IT'S NOT MANDATORY AND OPTIONAL AS JOHNSON AND OTHER CASES HAVE SAID, THE ENTIRE PROCESS THAT WE HAVE IN MELBOURNE WILL ERODE AND DIE, WE WON'T HAVE A PROCESS OF INQUIRY, PROCESS OF ASSESSMENT BY THE JUDGE CONSIDERING ALL THE RELEVANT CIRCUMSTANCES AND THE FACTORS THAT ARE INVOLVED AND THAT JUST SIMPLY DOESN'T TAKE PLACE ON THIS RECORD SO WE ARE JUST SAYING STEP 3 IS WHERE THIS BURDEN OF PERSUASION IS IMPOSED. THIS PARTICULAR DEFENDANT NEVER GOT THE OPPORTUNITY BECAUSE STEP 3 NEVER GOT CONDUCTED.

>> SHOULD HAVE SAID, YOUR HONOR, MAY I PRESENT EXPLANATION AS TO WHY I IT'S NOT A RACIAL REASON, WHAT'S WRONG WITH THAT?

>> ALL THAT RELATES TO NEUTRALITY AND NEUTRALITY IS NOT THE ISSUE.

>> GOES TO STEP 3 GENUINENESS, YOUR HONOR, I HAVE REASONS I WOULD LIKE TO PRESENT TO YOU WHY I BELIEVE THAT'S NOT GENUINE.

>> I HAVE REASONS WHY IT'S NEUTRAL AND THAT'S -- SEEMS TO BE CONFLATING STEP 2 WITH STEP 3.

SHE ONLY DID STEP 2, SHE ONLY DETERMINED NEUTRALITY.

>> OKAY, YOU SLICED THIS AND DICED THIS, BUT THE POINT IS THE JUDGE SAID WHAT SHE SAID AND THEN THE DEFENSE COUNSEL SAID NOTHING.

>> WELL --

>> AND I THINK THE POINT IS WHY -- WHY SHOULDN'T THE DEFENSE COUNSEL HAVE TO SAY, HEY, MORE RESPECTFULLY THAN THAT, YOUR HONOR, RESPECTFULLY YOU NEED TO DO THIS AND I OBJECT THAT THIS HAS NOT HAPPENED, WHATEVER IT

IS, THAT'S THE WAY THINGS WORK
IN COURT, THAT'S HOW OBJECTIONS
ARE PRESERVED, THAT'S HOW WE
HAVE A PROCESS WHERE WE WHERE
THE TRIAL COURT HAS THE
OPPORTUNITY TO ADDRESS CONCERNS
RATHER THAN IT BEING BROUGHT UP
ON APPEAL AND WHEN A WHOLE TRIAL
HAS TO BE REDONE AND -- AND I
DON'T UNDERSTAND WHY THAT IS
SUCH AN UNBEARABLE BURDEN FOR
THE DEFENSE TO HAVE IN
CIRCUMSTANCES SUCH AS THIS.

>> BECAUSE, YOUR HONOR, SIMPLY
BECAUSE THE TRIAL COURT IS THE
ONE RESPONSIBLE FOR ENFORCEMENT
AND ALSO WE HAVE -- WE HAVE A
PRESERVATION REQUIREMENT AND
MECHANISM, IT'S BEEN IMPOSED FOR
20 YEARS AND THE DEFENDANT IN
THIS CASE FULFILLED THAT.

WHEN YOU GIVE NOTICE IT
INITIALLY, THE TRIAL JUDGE HAS
TO DO GENUINENESS, WHEN YOU
REOBJECT, THERE'S NO INDICATION
ON RECORD, WE HAVE TO APPLY
REASON, COMMON SENSE IN
MELBOURNE, HOW CAN IT BE FAIR TO
IMPOSE WAIVER IN A SITUATION
WHERE THE DEFENDANT INVOKED THE
PROCEDURE INCLUDING STEP 3,
REOBJECTED --

>> THE WHOLE IDEA OF
PRESERVATION IN GENERAL IS THAT
THE TRIAL COURT HAS TO BE
APPRIZED OF THE SPECIFIC GROUNDS
FOR AN OBJECTION IN A TIMELY
MANNER AND THAT'S -- I MEAN, YOU
TALK ABOUT ALL OF THIS BUT WHEN
YOU GET TO THE NUB OF THE MATTER
HERE, THAT JUST WASN'T DONE, NOW
YOU'RE SAYING THIS OUGHT TO BE
TREATED DIFFERENTLY FOR VARIOUS
REASONS BUT I STRUGGLE TO
UNDERSTAND WHY PLACING THE
BURDEN ON THE DEFENSE TO
PRESERVE AN OBJECTION TIMELY AND
SPECIFICALLY AS IS REQUIRED
THROUGHOUT THE PROCESS OF A
TRIAL IS SOMEHOW AN UNBEARABLE

BURDEN IN THIS PARTICULAR
CONTEXT, I DON'T GET THAT.
>> THE NOTICE THAT'S GIVEN TO
THE TRIAL JUDGE TO DO THAT IS TO
FULFILL STEP 1 OF MELBOURNE,
LIKE DISCOVERY, WHEN THERE'S A
DISCOVERY VIOLATION, WE DON'T
SAY THAT YOU HAVE TO REASK THE
COURT TO DETERMINE PROCEDURAL
PROCEDURE, IN COMPETENCY WE
DON'T SAY THAT THERE'S
ADDITIONAL REQUIREMENT OR
HURDLE, THE JUDGE HAS TO GO FROM
START TO FINISH AND INCLUDE AND
ASSESS ALL OF THE STEPS OF GIVEN
PROCEDURE WHICH ARE KNOWN AND
HAVE BEEN ESTABLISHED FOR
DECADES.

>> ALL RIGHT.
THANK YOU.

>> THANK YOU.

>> APPRECIATE IT.

>> YOUR HONOR, THE STATE
MAINTAINS THIS IS ABOUT
PRESERVATION, OKAY, STEP 3 IS
ALIVE AND WELL BUT WHETHER THE
LIVE IS LONG OR SHORT OF STEP 3
WILL DEPEND ON THE OBJECTOR AND
NOT THE TRIAL JUDGE, THE
OBJECTOR IS THE ONE MAKING THE
OBJECTION, HAS THE ENTIRE BURDEN
OF PERSUASION AND THIS DEFENSE
ATTORNEY, HE HAD AMPLE
OPPORTUNITY TO MAKE ANY
ARGUMENTS HE WANTED, THIS WAS
EARLY IN THE PROCESS AND HE
ENDED UP REQUESTING AN EXTRA
PEREMPTORY, SHE USED ALL 10 OF
PEREMPTORIES AND REQUESTED
ANOTHER ONE, HE WASN'T TIMID
WITH THE JUDGE, IF HE HAD AN
ARGUMENT TO MAKE, HE CHOSE NOT
TO AND CAN'T BE PUT AS ERROR ON
THE TRIAL COURT THAT A REASON
WAS GIVEN, A VERY GOOD REASON
GIVEN, CSI EVIDENCE, THIS JUDGE
ALSO HAD ADDITIONAL INFORMATION
THAT THE STATE HAD ACCEPTED TWO
WOMEN WHO WERE AFRICAN AMERICAN
THAT THE DEFENSE STRUCK, THAT

HAPPENED MOMENTS BEFORE, IF YOU LOOK ON PAGE, I BELIEVE IT'S 790 OF THE RECORD OF THE SUPREME COURT RECORD WHEN THIS STRIKE HAPPENED, ON THE NEXT -- ON THE PAGE BEFORE THAT, SHE HAD ACCEPTED THE JURORS, DEFENSE HAD STRUCK THEM, TRIAL JUDGE KNEW THAT AND THE PROSECUTOR POINTED THAT OUT, WE KNOW THAT IN THE RECORD, OKAY, SO THE JUDGE HAD THAT INFORMATION AND THEN THERE'S THE PRESUMPTION OF NONDISCRIMINATION, SO EVERYTHING BEFORE THIS JUDGE WAS GENUINE AND THIS WAS UP TO DEFENSE ATTORNEY TO MAKE ARGUMENT IF IT WAS OTHERWISE, HE DIDN'T, HE DIDN'T DO ANYTHING.

AND THIS IS -- IF YOU FOLLOW WHAT THEIR REASONING IS, IT'S A GOT-YOU, IT SMACKS OF GOT-YOU, IT'S LIKE THIS JUDGE WHO WAS PRESENTED THESE SET OF UNDISPUTED CIRCUMSTANCES MAKES A RULING AND THEN ON APPEAL FOR THE FIRST TIME YOU SAY, OH, YOU DIDN'T DO THAT RIGHT, YOU DIDN'T DO IT RIGHT, SO YOU GET A NEW TRIAL AND THAT CAN'T BE, I MEAN, STATE REFERS THE COURT TO MELBOURNE, YOU KNOW, THE RIGHT TO IMPARTIAL JURY GUARANTIED BY THE CONSTITUTION IS BEST SAFEGUARDED BY REVERSIBLE ERROR TRAPS BUT REASON AND COMMON SENSE.

>> YOU KNOW, AND AGAIN, I SYMPATHIZE WITH WHAT YOU'RE SAYING BUT MELBOURNE HAS BEEN AROUND FOR QUITE SOME TIME, TRIAL JUDGES KNOW WHAT THEY HAVE TO DO, THIS JUDGE KNEW WHAT SHE HAD TO DO AND SHE CUT THE PROSECUTOR OFF AND IF SHE HADN'T DONE THAT PERHAPS WE SHOULDN'T HAVE BEEN HERE.

YOU MAY WANT US TO RECEDE OR CHANGE IT BUT THAT'S THE WAY IT'S BEEN, THE JUDGE DIDN'T

FOLLOW IT.

>> WELL, JUDGE, THE STATE MAINTAINS THAT THERE WAS IMPLICIT FINDING BASED ON OTHER CIRCUMSTANCES THAT I WENT THROUGH THAT WERE UNDISPUTED AND THEN SHE SAID THE RULING, IT CAN BE IMPLICIT, DOESN'T HAVE TO BE EXPRESSED FINDING OF GENUINENESS BUT FOR ALL THE REASONS I POINTED OUT BEFORE ABOUT THE OPERATION OF THE MELBOURNE PRINCIPLES, ABOUT THE REASONING OF FLOYD, HOSKINS AND KING, IT'S ON THE OBJECTOR TO MAKE THEIR RECORD, IT IS NOT ON THE TRIAL COURT AND THAT'S PRESERVATION. SO IF THE COURT DOESN'T HAVE ANY OTHER QUESTIONS, STATE REQUEST THAT YOU QUASH THE DECISION OF THE FOURTH DISTRICT.

>> ALL RIGHT.

WE THANK YOU BOTH FOR YOUR ARGUMENTS AND THE COURT WILL NOW STAND IN RECESS FOR ABOUT TEN MINUTES.